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Supreme Court, U.S.
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No. 97-804

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF STANISLAUS, a public entity; and MARY GROGAN, an individual; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC GAS & ELECTRIC COMPANY; PACIFIC GAS TRANSMISSION COMPANY and ALBERTA & SOUTHERN GAS COMPANY, LTD.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:
DONALD H. GLASRUD
TIMOTHY JOHN BUCHANAN
DIETRICH, GLASRUD & JONES
5250 North Palm, Suite 402
Fresno, California 93704
(209) 435-5250

M. LAURENCE POPOFSKY
Counsel of Record
MARIE L. FIALA
THOMAS E. REIBER
HELLER EHRMAN WHITE & McAULIFFE
333 Bush Street, Suite 3100
San Francisco, California 94104
(415) 772-6000

Attorneys for Respondents

72665 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTION PRESENTED

Does the filed rate doctrine bar a private antitrust claim under Section 1 of the Sherman Act brought by natural gas ratepayers against a regulated utility alleging that volumes of gas imported from Canada under a contract specifically found to be in the public interest and competitive by federal regulators were nonetheless anticompetitive?

RULE 29.6 STATEMENT

Pacific Gas and Electric Company ("PG&E") discloses that its parent company is Pacific Gas and Electric Corporation. Pacific Gas Transmission Company's ("PGT") parent company is Pacific Gas Transmission Corporation. Alberta and Southern Gas Co., Ltd.'s ("A&S") parent company is PG&E. PG&E's only nonwholly owned subsidiary is Standard Pacific Gas Line, Inc. PGT and A&S have no nonwholly owned subsidiaries.

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Respondents Pacific Gas and Electric Company ("PG&E"), Pacific Gas Transmission Company ("PGT") and Alberta and Southern Gas Co., Ltd. ("A&S") (collectively, "PG&E" or "Respondents") oppose Mary Grogan and the County of Stanislaus's (collectively, "Petitioners") Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

The Petition properly identifies the opinions below and Petitioners' basis for invoking this Court's jurisdiction.

STATUTORY PROVISIONS INVOLVED

Respondents agree that the statutes involved include 15 U.S.C. § 1, 15 U.S.C. § 8, 15 U.S.C. § 14, and certain provisions of the Natural Gas Act ("NGA"), including 15 U.S.C. § 717b. *See* Petition, Exhibit E. However, Respondents do not agree that the provisions of the Federal Power Act reproduced in Exhibit E — including 16 U.S.C. § 824, 16 U.S.C. § 824d (cited erroneously as 15 U.S.C. § 824d) and 16 U.S.C. § 824e (cited erroneously as 15 U.S.C. § 824e) — are involved.

INTRODUCTION

Petitioners are California ratepayers who sued PG&E in 1993, claiming that a decades-long price fixing conspiracy among PG&E, its subsidiaries and scores of Canadian natural gas producers injured them by inflating gas prices. The imported gas reached consumers through a series of transactions whose key price and volume terms were reviewed and approved by two federal regulatory agencies and the California Public Utilities Commission ("CPUC"). Petitioners ultimately bought the gas at regulatorily-filed rates. Because of this extensive

upstream regulatory review and approval, the Court of Appeals affirmed dismissal of the primary price fixing claims pursuant to a straightforward application of the filed rate doctrine.[1] The Petition does not contest this holding. Petition at 7 n.5. Nor does it question the wisdom or continuing vitality of the filed rate doctrine.

Petitioners also pled the theory that Respondents conspired to buy too much gas from the Canadian producers in order to fill the Canada-to-California pipeline, thereby preventing Petitioners from transporting their own independently-procured gas supplies to California. Dismissal of these so-called denial of access claims also was affirmed by the Court of Appeals under *Keogh*. Just as the *price* PG&E paid for gas had been federally-filed and approved as in the public interest, and therefore was deemed competitive, so had the precise *volumes* of gas imports.

Faced with these unexceptional holdings, Petitioners retreat from the theories pled below. Now, the Petition entirely recasts the "denial of access" claims as a challenge to PG&E's decision to purchase gas from a single, high-priced supply source in Canada rather than from some hypothetical, supposedly cheaper import alternative. This theory was never asserted in the District Court and was not fairly tendered to the Ninth Circuit, having been advanced only in Petitioners' reply brief and petition for rehearing. Since the "supply choice" issue does not arise on the District Court record and was not addressed by the Ninth Circuit, there is no plausible — let alone compelling — reason for this Court to consider it.

In any event, the supply choice claim articulated in the Petition is little more than a collateral challenge to the prudence of

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1. The filed rate doctrine traces its roots to *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922), and thus often is referred to as the *Keogh* doctrine.

PG&E's Canadian gas acquisition arrangements. That is the province of regulators, not antitrust tribunals. In the regulatory setting, the filed rate doctrine enforces federal preemption over wholesale energy regulation by disabling state regulators from second-guessing federal decisions. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) ("*MP&L*"). Under the Supremacy Clause, a state public utilities commission may not disallow a utility from recovering in rates its federally-approved wholesale energy costs. *Nantahala*, 476 U.S. at 970.[2]

By comparison, in antitrust jurisprudence the filed rate doctrine is concerned not with the demarcation between federal and state authority, but with the interplay between regulatory and antitrust policies. In that context, *Keogh* mandates that regulatory filing and approval conclusively establish rates or agreements as reasonable and lawful for antitrust purposes. *Keogh*, 260 U.S. at 162-63; *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). Thus, an antitrust plaintiff may not obtain treble damages when the alleged injury flows from payment of a filed rate; the legal rights of customers who pay filed rates are strictly limited to the rates themselves. *Id.*; *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 416 (1986).

Ignoring the critical distinction between the Supremacy Clause and antitrust branches of the filed rate doctrine, Petitioners seek *certiorari* on the basis of a supposed conflict between the opinion below and a multitude of federal and state court decisions, all of which involve only Supremacy Clause issues. The Ninth Circuit perceived no such conflict, and for good reason: not one of the

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2. The jurisdictional disputes that arose out of the construction of the Grand Gulf 1 nuclear power project in Port Gibson, Mississippi, with which this Court is familiar, fall into this category. *See MP&L*, 487 U.S. 354 (1988); *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350 (1989).

supposedly "conflicting" authorities is even an antitrust case, let alone a case where an antitrust challenge to a utility's allegedly anticompetitive selection of supply sources survived *Keogh* or even was raised. In any event, the holding here — that federal *filing* and *approval* of the specific volumes of gas imported by PG&E sufficed to bar a treble damages claim pursuant to *Keogh* — is consistent even with the Supremacy Clause cases.

COUNTER-STATEMENT OF THE CASE

PG&E is a regulated public utility that sells natural gas to residential, industrial and public users, including Petitioners, in northern and central California. Until 1993, PG&E bought gas from a pool of producers in Alberta, Canada pursuant to contracts entered into by its Canadian subsidiary, A&S, in compliance with Canadian federal and provincial law. At the United States-Canada border, A&S sold the gas to PGT, another PG&E subsidiary, which transported it to California via PGT's pipeline after obtaining required federal regulatory approvals of the gas import volumes and price. PGT then sold the gas to PG&E at the California border, and PG&E thereafter delivered it to consumers at rates reviewed and approved by the CPUC.

Both the District Court and the Court of Appeals considered the comprehensive federal regulation of PG&E's import arrangements — specifically, the Economic Regulatory Administration's ("ERA")[3] approval of the exact volumes of gas purchased from the exact source (A&S) at the exact prices

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3. ERA is an arm of the Department of Energy. It was the regulatory body responsible for regulating natural gas imports and exports across the United States international border at the time PG&E's relevant import arrangements were reviewed and approved. Respondents use the term "ERA" to refer to ERA and its successor, the Office of Fossil Energy, which assumed responsibility for natural gas imports in 1989.

alleged to have been anticompetitive — to be dispositive of Petitioners' claims under settled filed rate principles. However, the Petition omits any mention of the key regulatory history *specific to Respondents*. For that reason, this counter-statement details the operative import authorizations granted to Respondents which trigger application of *Keogh*.

A. The Federal Regulatory Framework: An Overview

When Congress enacted the NGA in 1938, it granted to the Federal Power Commission ("FPC") jurisdiction under Section 3 to regulate natural gas imports into the United States and to approve import arrangements unless they are not "consistent with the public interest." 15 U.S.C. § 717b(a). In 1977, the Department of Energy Organization Act transferred this authority to the Department of Energy ("DOE") which, in turn, issued delegation orders vesting Section 3 authority in ERA. Once ERA approved the terms on which gas entered the United States, jurisdiction passed to the Federal Energy Regulatory Commission ("FERC") to regulate the interstate transportation and sale of that gas. 15 U.S.C. § 717c.

In 1984, the Secretary of Energy issued guidelines to ERA designed to accommodate competitive market interests, regulatory concerns and international trade issues in assessing natural gas import arrangements. *New Policy Guidelines and Delegation Orders*, 49 Fed. Reg. 6684 (1984) (the "DOE Guidelines").[4] The DOE Guidelines provided that when determining whether a particular import arrangement was in the "public interest," ERA should consider the import's competitiveness in the market to be served, the need for the natural gas, and the security of the gas supply. *Id.*; *County of*

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4. The Petition erroneously attributes the DOE Guidelines to Congress. Petition at 9 n.7.

Stanislaus v. PG&E, 114 F.3d 858, 861 (9th Cir. 1997), Appendix A to Petition For Certiorari ("App."), at 7a. ERA also was directed to consider "international trade policy, foreign policy, and national security interests that may bear on an import authorization." DOE Guidelines, 49 Fed. Reg. at 6688. In implementing the DOE Guidelines, ERA presumed that the terms of a gas import arrangement were "prudent if they [were] freely negotiated and flexible, unless this presumption [was] rebutted." *TransCanada Pipelines Ltd. v. FERC*, 878 F.2d 401, 407-08 (1989). Thus, approval of an import arrangement subsumed a finding that the import arrangement was prudent and foreclosed any claim that the importer could have obtained a better deal elsewhere. *Id.* (the "argument that ERA does not consider prudence because it does not focus on whether the pipeline could have obtained gas elsewhere for less is, in reality, a policy disagreement" with ERA and the Secretary of Energy).[5]

In 1992, long after the regulatory approvals of PG&E's import arrangements, Congress amended the NGA by enacting the Comprehensive National Energy Policy Act ("EPAct"). Section 201 of the EPAct, 15 U.S.C. § 717b(c), altered the standard for ERA's review and approval of certain natural gas imports, providing that henceforth an import of natural gas from a nation with which a free trade agreement was in effect (which includes Canada) "shall be deemed to be consistent with the public interest." In so doing, Congress essentially codified the common sense presumption that buyers of imported natural gas (whether private parties or utilities subject to downstream rate regulation) would seek the best import terms, and expressed its

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5. It was during this time that ERA began issuing the "blanket authorizations" that are featured so prominently in the Petition. No such authorizations were granted to PG&E, and they played no part in the decision below.

judgment that such imports advanced the Nation's foreign trade policy. The EPAct did not alter the filed rate doctrine in any way.[6]

B. Federal Approval Of PG&E's Import Prices And Volumes

In 1984, PGT sought authorization from ERA to import natural gas destined for California consumers under a contract between A&S and PGT (the "International Contract"). On November 1, 1984, ERA conditionally approved PGT's application, but withheld final approval subject to a showing by PGT "that the import arrangement . . . is competitive in the Pacific Gas and Electric Company (PG&E) markets." *Re PGT*, 1 ERA ¶ 70,574 (1984). In assessing whether PGT's gas import arrangement served the public interest and was competitive in the California market, ERA was governed by guidelines which required it specifically to evaluate

> *the volume of gas under contract, base price*, price review or adjustment mechanisms, take-or-pay obligations, make-up provisions, length of the contract, and other terms which may affect marketability of the gas.

DOE Guidelines, 49 Fed. Reg. at 6688 (emphasis added).

ERA permitted interested parties to intervene in the proceeding to support PGT's application or to oppose it on any grounds, including that the International Contract might have anticompetitive consequences for the California market. Nineteen intervenors did so.[7] In April 1985, after considering all parties' positions, ERA

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6. By the same token, Congress confirmed that it did not intend to alter the existing jurisdictions of FERC or state public utilities commissions over natural gas transactions. *See* Petition at 24 (quoting bipartisan statement).

7. Six of the intervenors, who were affiliated with PG&E's major (Cont'd)

approved the International Contract and granted PGT an import authorization through 1993, concluding that "PGT's import arrangement is competitive and market-responsive." *Re PGT*, 1 ERA ¶ 70,591 (1985); *Stanislaus*, App. A at 7a; *Stanislaus*, App. B at 28a-30a. In order to ensure that the terms of the International Contract remained competitive, PGT was required to file public quarterly reports with ERA showing "the quantities of gas imported, the average price paid per MMBtu for both the demand and commodity components, and the average delivered price at the California border per MMBtu." *Re PGT*, 1 ERA ¶ 70,591, at 72,387. Any interested party was afforded the opportunity to oppose PGT's volumes and prices set forth in the quarterly reports, and ERA of course maintained jurisdiction to consider such issues on its own initiative. *See, e.g., Re PGT*, 1 FE ¶ 70,371 (1990); 10 C.F.R. § 590.407; *Stanislaus*, App. B at 28a-30a.[8]

ERA thus did not "rubber-stamp" PGT's application, as Petitioners suggest. Petition at 9. To the contrary, it carefully examined the International Contract, retained authority over the parties' performance thereunder, and consistently approved both

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domestic gas supplier, opposed PGT's application on the grounds that the proposed volumes of Canadian gas imports would adversely affect future domestic gas supplies. The CPUC, representing the interests of California ratepayers, intervened to express its support for the International Contract. *Re PGT*, 1 ERA ¶ 70,591, at 72,385-86; *Stanislaus*, App. B. at 28a.

8. In addition to the above-described ERA review and approval of PG&E's gas imports, FERC approved the sales contract between PGT and PG&E under a statutorily-prescribed "just and reasonable" standard, and regulated the terms on which PGT transported and sold gas to PG&E under that contract. *See Stanislaus*, App. A at 7a; 15 U.S.C. § 717c(c) (requiring regulated entities, including PGT, to file with FERC "schedules showing all rates and charges for transportation or sale subject to the jurisdiction of [FERC]. . . .").

the volumes and prices of PGT's gas imports throughout the relevant time period.[9]

C. The Proceedings Below

Petitioners filed this action in December, 1993, alleging that PG&E and PGT conspired with Canadian producers to fix the price of natural gas imported from Canada and sold to California consumers. That complaint was dismissed on filed rate and state action immunity grounds, with leave to amend. *See Stanislaus*, App. A at 9a. Petitioners duly amended the complaint, adding A&S as a defendant and alleging both price fixing and denial of access claims. The denial of access claims were predicated on the theory that Respondents conspired to fill the PGT pipeline to capacity, thereby denying Petitioners access to the pipeline to transport their own independently-procured gas to California. Again the District Court dismissed the price fixing claims on filed rate and state action immunity grounds, this time with prejudice. *Stanislaus*, App. B, at 43a-44a. The District Court also dismissed the denial of access claims on the same grounds and, in addition, for lack of standing, failure to plead a conspiracy and failure to file within the statute of limitations. *Id.* at 58a-63a. Finally, Petitioners' claim for injunctive relief was dismissed as moot, as Respondents had terminated the Canadian supply contracts at issue prior to the filing of the initial complaint. *Id.* at 63a-65a; *see also Stanislaus*, App. A at 6a n.2.

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9. Nor, as a general matter, did ERA "rubber stamp" all import applications. To the contrary, it had the authority to, and did, require pipelines to submit their import prices and any changes to contract terms for approval. Parties raised, and ERA considered, a myriad of complex issues, including contract terms, pipeline access, price competitiveness (indeed, some argued that prices were too low), allegations of discrimination, and the affiliated corporate structures of pipelines with suppliers or purchasers. *See, e.g., Re EnTrade Corp.*, 1 ERA ¶ 70,774 (1988); *Re Brooklyn Union Gas Co.*, 1 FE ¶ 70,285 (1991); *Re Mobil Gas Co., Inc.*, 1 ERA ¶ 70,745 (1988).

Petitioners appealed to the Ninth Circuit which affirmed the lower court's dismissal of the complaint.[10] The Court of Appeals found the price fixing claims barred by a routine application of *Keogh*. *Stanislaus*, App. A at 12a. It likewise agreed that the denial of access claims could not withstand *Keogh*: just as rates filed with ERA and FERC must be accepted as conclusively reasonable in an antitrust case, so must the volumes of gas filed with and approved by ERA. The Ninth Circuit reasoned that PG&E's import volumes, which ERA had determined to be competitive and thus "in the public interest," could not simultaneously cause any injury cognizable under the Sherman Act. *Id* at 13a-18a. The Court of Appeals also recognized that, however characterized, Petitioners' grievances actually reduced to the complaint that the rates they had paid were too high:

> [Petitioners sought] damages based on the difference between the rate paid for gas — a filed rate — and the rate potentially available from other Canadian producers. In reality, though framed as a challenge to access, this claim, too, is little more than a challenge to rates that FERC approved and filed for gas that PG&E imported, especially in light of [Petitioners'] failure to seek access to alternative suppliers of gas. The filed rate doctrine bars the denial of access claims.

Stanislaus, App. A at 18a.[11]

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10. Petitioners did not appeal dismissal of the denial of access claims for lack of standing or dismissal of the claim for injunctive relief.

11. Several state Public Utilities Commissions have appeared as *amici* in support of Petitioners, apparently out of a concern that certain language employed by the Court of Appeals suggests limits on their jurisdiction where international imports are concerned. However, as is clear from its opinion, the Ninth Circuit was not presented with and did

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THE PETITION PRESENTS NO CREDIBLE CONFLICT OR IMPORTANT ISSUE OF FEDERAL LAW

1. The Petition does not question the continuing vitality of *Keogh*, which bars treble damages recovery by parties claiming injury by virtue of paying a filed rate for goods or services. *See Keogh*, 260 U.S. at 163 (reasoning that plaintiff can suffer no "antitrust injury" by payment of a filed rate since legal rights are defined solely by that rate). Although *Keogh* has had its critics over the years, Petitioners do not invite this Court to dismantle what has been "an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6½ [now 7½] decades." *Square D*, 476 U.S. at 423.[12] The issue sought to be reviewed thus concerns only the particular application of *Keogh* to this case.[13]

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not decide the extent of state public utilities commissions' jurisdiction or whether the NGA divests them of authority to review the prudence of a utility's international supply choices. *Compare* Petition at 23-24. Respondents submit that not only are *amici's* fears vastly overblown, but that the existence of assertedly imprecise dicta about an issue not presented is scarcely grounds for granting *certiorari*.

12. The lower courts repeatedly have reaffirmed and applied *Keogh*. *See, e.g., Sun City Taxpayers v. Citizens Utils.*, 45 F.3d 58 (2d Cir.), *cert. denied*, 514 U.S. 1064 (1995); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992); *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir.), *cert. denied*, 506 U.S. 1021 (1992).

13. The Petition inflates the significance of the decision below to antitrust enforcement, asserting that it signals the demise of antitrust litigation by private parties and the DOJ and predicting that utilities throughout the nation will travel across the international border into Canada to flout the antitrust laws "with impunity." Petition at 12. But volumes have been at issue in only a handful of cases, which arose in the

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2. The Petition also raises no issue concerning the price fixing claims which formed the centerpiece of both complaints below: "Petitioners do not contest the Ninth Circuit's holding that their price-fixing claims are barred by the filed rate doctrine." *See* Petition at 7 n.5. The Petition makes this concession without regard to the fact that ERA did not "mandate" payment of any particular price for PG&E's gas imports. ERA approved the International Contract as a whole, not a price *per se*. In fact, the ERA-approved International Contract contained *flexible pricing terms*, including provisions for periodic price redeterminations that enabled the price of the gas to remain competitive over the duration of the contract. *See supra* at 7-8. As a result, the prices PG&E filed with ERA were in no meaningful sense "mandated." Yet that regulatory action unquestionably was sufficient to require dismissal of the price fixing claims under *Keogh*, as Petitioners now concede. *Square D*, 476 U.S. at 414, 417-23; *Montana-Dakota*, 341 U.S. at 251-52. Nonetheless, the Petition postulates a distinction between volumes and price on the ground that the volumes imported were not "mandated" by ERA. But what PG&E was required to and did obtain was a "competitiveness" finding from ERA as to the *entire* International Contract, including both the import volumes and price. Given that the regulatory process and result were one and the same, the price and volume terms of the International Contract are indistinguishable for purposes of applying *Keogh*.

3. Drawing a distinction between price and volumes would enable antitrust litigants to skirt *Keogh* by disguising a challenge

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regulatory context. Price surely matters more, yet *Keogh*'s application in the international sphere has scarcely brought the Sherman Act to its knees. In any event, *Keogh* only bars private treble damages actions. *See Square D*, 476 U.S. at 422 (addressing and rejecting argument that *Keogh* is an immunity doctrine). It does not bar claims for injunctive relief, like that raised by Petitioners below which was dismissed as moot. *Id.* Nor does it bar criminal or civil enforcement actions by the DOJ. *Id.*

to rates as a "supply choice" issue. Ratepayers dissatisfied with federal or state regulatory results would need only to allege that the rate they paid would have been lower had their utility but purchased cheaper power from a different source. As the Court of Appeals recognized, that is exactly what Petitioners tried to do here.[14] If Petitioners' claim truly were that PG&E should have bought cheaper gas from different sources, the only cognizable injury they could have suffered would have been payment of a rate that allegedly was too high. That, in turn, brings Petitioners full circle back to a claim that is barred by *Keogh*.

4. The proffered conflict between the Court of Appeals' decision and the decisions of other federal and state courts is entirely illusory. Literally *none* of Petitioners' supposedly "conflicting" cases involves the antitrust application of the filed rate doctrine, let alone holds that an antitrust claim premised on a utility's anticompetitive selection of supply sources survives *Keogh*.

The only "conflict" or confusion emanates from the Petition itself. As described above, the filed rate doctrine has diverged into two distinct branches over the years — in the antitrust and Supremacy Clause contexts — each driven by different considerations.[15] It is from the Supremacy Clause cases alone

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14. *See Stanislaus*, App. A at 16a ("[N]o matter what the reality of the alleged anticompetitive behavior, plaintiffs here would still be paying PG&E's rates. That those rates could theoretically be lower is precisely what compels application of the filed rate doctrine.").

15. Of course, the two branches of filed rate jurisprudence share a common definition of what constitutes a "filed rate" sufficient to invoke application of the doctrine. As the doctrine has evolved over the years, it no longer is "limited to 'rates' *per se*, but applies to any activity under the controlling agency's regulatory power." *Stanislaus*, App. B at 44a; *Nantahala*, 476 U.S. at 973; *MP&L*, 487 U.S. at 374-75. It therefore was entirely appropriate for the Ninth Circuit to rely on *Nantahala*, a

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that Petitioners derive the supposed distinction between "permissive" approvals and "mandatory" agency orders which forms the central thesis of the Petition. *See, e.g.*, Petition at 13 ("the *sine qua non* of the filed rate doctrine is a regulatory agency's mandate; if no regulatory agency has mandated the purchasing decision, the doctrine is not implicated."). But to the extent the mandatory-permissive distinction has found any home, it is only within a narrow exception to preemption principles — the *Nantahala* or *Pike County* exception[16] — that in limited circumstances allows a state commission to examine a utility's energy supply choices made at or within the State's borders. The exception embodies a particularized attempt by courts to reconcile the boundaries of federal wholesale regulation and state retail rate regulation. But it has no place in federal antitrust jurisprudence, where the filing of a rate or agreement definitively establishes the legal rights of all parties and bars a private treble damages action. Not even the courts that have applied the *Nantahala* exception have suggested that the ratemaking functions of federal and state regulators be handed over to private litigants and the courts. The Court of Appeals saw no reason to incorporate the Supremacy Clause analysis into the antitrust laws, and the Petition offers none.

5. Even assuming that a distinction may be drawn between

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Supremacy Clause case, in answering the threshold question whether ERA review and approval establishes an import volume as conclusively reasonable in the same manner as it does an import price.

16. While this Court has acknowledged the existence of the exception in the regulatory ratemaking context, it has never "agreed" with or "supported" it. Moreover, those references clearly were limited to prudence issues. *Nantahala*, 476 U.S. at 972-73; *MP&L*, 487 U.S. at 373-74. *Compare* Petition at 4, 15. This Court has never even mentioned the exception in the antitrust setting.

permissive and mandatory agency orders of various types, it is inoperative here because ERA's approval of the terms and conditions of the International Contract was no less "mandatory" than the federal regulatory approvals held preemptive in *Nantahala*. The International Contract specifically approved by ERA as competitive and in the public interest obligated Respondents to import full volumes of gas (the same volumes that allegedly filled the pipeline to Petitioners' detriment) so long as the gas was competitive in PG&E's market. This is no different in kind from the facts of *Nantahala*, where two related power companies voluntarily filed a contract with FERC allocating the rights to purchase high and low cost power between themselves. FERC adjusted the parties' contract to ensure that the rates charged were "just and reasonable," but did not "mandate" that either company enter into the contract in the first place or actually take power thereunder. The filed rate doctrine nonetheless applied. Here, ERA's approval of the International Contract "mandated" that the parties comply with its terms to the same extent as FERC's approval of the contract in *Nantahala* "mandated" an allocation of power. The Ninth Circuit therefore correctly found that *Keogh* barred any claim that the actual import of those volumes was "anticompetitive."

But that said, the mandatory-permissive distinction advanced in the Petition was not urged in the District Court as a grounds for sustaining Petitioners' denial of access claims. As a result, no meaningful record regarding any of the factual issues relevant to Petitioners' latest hypothesis was developed there. Nor was the argument fairly put to the Ninth Circuit as a ground for reversal; consequently it is not addressed in the opinion below. It makes little sense for this Court to decide an issue that has undergone no analysis, legal or factual, in the lower courts.

6. The dismissal of the denial of access claims comports with national competition policy. During the relevant time period, ERA

adjudged PG&E's import arrangement to be in the public interest and competitive. *See supra* at 7-8. By definition, a comparable finding would have to have been made as to any supposedly cheaper supply alternatives allegedly available to PG&E in the Canadian market. Such regulation leaves no room for the antitrust laws to impose an additional (and potentially different) standard of competitiveness on import decisions. While we do not believe that a choice made among federally-approved and competitive supply sources is a proper issue for state regulators under prudence review,[17] it certainly is not one that should be adjudicated under the antitrust laws, let alone in the international context. Put otherwise, an antitrust claim cannot be extracted out of choices made among supply sources that are or must be federally approved as competitive. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981); *H.J., Inc.*, 954 F.2d at 492-94; *Wegoland*, 27 F.3d at 21.[18]

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17. PG&E challenged the CPUC's authority to review the prudence of its federally-approved Canadian natural gas acquisition arrangements in a separate lawsuit filed in the Northern District of California. *Pacific Gas and Elec. Co. v. California Pub. Utils. Comm'n*, Civil No. 94-4381 FMS (N.D. Cal.). The CPUC defended its authority on the identical grounds raised in the Petition. PG&E obtained a preliminary injunction against enforcement of a CPUC order disallowing its federally-approved gas costs, and argued in a motion for summary judgment that the *Stanislaus* decision put to rest the CPUC's argument that it was authorized to conduct a prudence review of PG&E's Canadian gas acquisitions. PG&E ultimately agreed to dismiss its case as part of a global settlement of numerous proceedings pending before the CPUC. An appeal from a final judgment in that action would have raised the very regulatory issue that has been dressed up as an antitrust issue in the present Petition. Now it is a matter for another day.

18. The Petition devotes four pages to an invitation to the Court to interpret the NGA and decide whether ERA has jurisdiction to review the prudence of a utility's purchasing decisions. Petition at 23-26. These issues plainly were neither raised nor decided below, and equally plainly pose no antitrust issue. But in any event, the quoted legislative history

(Cont'd)

7. The changes in regulation of the natural gas industry over the past two decades do not vitiate *Keogh*, as the Petition asserts.[19] This Court already has concluded that unless expressly overridden by Congress, *Keogh* retains its full force and effect after an industry's deregulation:

> Similarly, Petitioners and the Solicitor General argue that private treble-damages actions would further the congressional policy of promoting competition in the transportation industry reflected in the Motor Carrier Act of 1980. We may assume this is the case — indeed, we may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy — but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980.

(Cont'd)
does not support Petitioners' assertion that Congress has granted the several States authority to review a utility's purchasing decisions among choices in international commerce. Nor have ERA or FERC disclaimed jurisdiction to review PG&E's choices among various supply sources in Canada, as that issue has not been tendered to those agencies. *Compare* Petition at 25. Each of the regulatory orders cited in the Petition recognizes that state regulators are limited to reviewing supply choices made at the State's border, not across international borders.

19. Respondents quite agree that, after approval of the International Contract, ERA adopted a presumption of competitiveness when evaluating import applications and a policy of granting "blanket authorizations," and that Congress subsequently codified ERA's presumptions and policies when it enacted the EPAct. *See supra* at 5-7. But none of these matters is relevant to the issues presented here.

Square D, 476 U.S. at 419-20. Congress made no changes to *Keogh* when it set about deregulating the natural gas market; *Keogh* applies as and when appropriate. In any event, these considerations scarcely distinguish volume from price and thus present no intellectually coherent basis for review.

8. The Petition does not raise any issues of ongoing concern that warrant this Court's attention. Petitioners' quarrel with the Court of Appeals' decision is with *Keogh*'s unique application to international commerce. Such ERA-approved import arrangements have rarely raised antitrust issues and are unlikely to do so in the future. Subsequent to the alleged conduct giving rise to this lawsuit, Congress passed the EPAct and the North American Free Trade Agreement, and federal and state regulators have undertaken the deregulation of other energy markets. The issues specific to PG&E's supply arrangements (which were terminated more than four years ago) are historic remnants of the deregulation of the natural gas market, and simply devoid of continuing significance to the evolving competitive landscape. *See* Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-67 (1953) (citing cases wherein *certiorari* denied despite a square conflict because issues no longer alive).

9. *Keogh* was but one of many procedural and substantive grounds that mandated dismissal of the denial of access claims. The Court of Appeals did not reach or was not asked to consider many of the separate and independent grounds upon which the District Court dismissed the denial of access claims in addition to *Keogh*, including: (i) state action immunity (*Stanislaus*, App. B at 50a-58a); (ii) Petitioners' lack of standing (*id.* at 58a-62a); (iii) failure to plead a conspiracy (*id.* at 63a); and (iv) failure to file within the statute of limitations (*id.* at 65a-67a). This fact further underscores that the Petition does not warrant this Court's attention. Since the outcome below likely would be unaffected by a reversal on the filed rate issue tendered by Petitioners, there

is no compelling reason for this Court to consider this controversy in order to achieve a "just result."

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

M. LAURENCE POPOFSKY
Counsel of Record
MARIE L. FIALA
THOMAS E. REIBER
HELLER EHRMAN WHITE
& McAULIFFE
333 Bush Street, Suite 3100
San Francisco, California 94104
(415) 772-6000

Of Counsel:

DONALD H. GLASRUD
TIMOTHY JOHN BUCHANAN
DIETRICH, GLASRUD & JONES
5250 North Palm, Suite 402
Fresno, California 93704
(209) 435-5250

Attorneys for Respondents